NO. 80-1164

MAR 26 19
ALEXANDER L. S
CLERK

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

PARKER McVICKER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ of Certiorari To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

CHARLES A. PALMER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent

QUESTION PRESENTED

I. Whether Section 42.07(a)(1) of the Texas Penal Code is unconstitutionally vague and overboard.

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES iii

QUESTIONS PRESENTED i

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 7

INDEX OF AUTHORITIES

Cases	Page
Coates v. Cincinnati, 402 U.S. 611 (1971)	5
Cohen v. California, 403 U.S. 15 (1971)	6
Collection Consultants, Inc. v. State, 556 S.W.2d 787 (Tex.Crim.App. 1977), *appeal dismissed*, 436 U.S. 901, *rehearing denied*, 438 U.S. 908 (1978)	3,4
Cox v. Louisiana, 379 U.S.(1965) 536	5
F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978)	6
Grayned v. City of Rockford, 408 U.S. 104 (1972)	3,4
Jordan v. DeGeorge, 341 U.S. 223 (1954)	3
Karp v. Collins, 310 F.Supp. 627 (D.N.J. 1970), *vacated on other grounds sub. nom. Kugler v. Karp*, 401 U.S. 930, *on remand*, 333 F.Supp. 15 (1971)	4
Kramer v. State, 605 S.W.2d 861 (Tex.Crim.App. 1979)	4,7
Lloyd Corporation, Ltd. v. Tanner, 407 U.S. 551 (1972)	6
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	3
People v. Smith, 392 N.Y.S.2d 968 (N.Y.S.Ct.), *cert. denied*, 434 U.S. 920 (1977)	4
Radford v. Webb, 446 F.Supp. 608 (W.D.N.C. 1978), *aff'd*, 596 F.2d 1205 (4th Cir. 1979)	7
Rose v. Locke, 423 U.S. 48 (1975)	3
Roth v. United States, 354 U.S. 476 (1957)	3
Rowan v. United States Post Office Department, 397 U.S. 728 (1970)	6
Smith v. Goguen, 415 U.S 566 (1974)	5
United States v. Harriss, 397 U.S. 612 (1954)	3

Walker v. Dillard, 523 F.2d 3 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975) 7

Wainwright v. Stone, 414 U.S 21 (1973) 3

Constitutional Provisions and Statutes

First Amendment, United States Constitution 2

Fourteenth Amendment, United States Constitution 2

N.J. Stat. Ann. 2AL 170-29 4

N.Y. Cons. Laws, Book 39 §240:30 5

Tex. Penal Code Ann. §1.05(b) 5

Tex. Penal Code Ann. §42.07(a)(1) ..... *passim*

Tex. Rev. Civ. Stat. Ann. art. 5429b-2, §2.01 5

28 U.S.C. §1257(3) 2

NO. 80-1164

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

PARKER McVICKER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari submits this Brief in Opposition.

OPINION BELOW

Petitioner correctly states that there is no written opinion of the Texas Court of Criminal Appeals.

JURISDICTION

Petitioner correctly seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner's attack on Section 42.07(a)(1) of the Texas Penal Code is based on the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's statement of the case.

SUMMARY OF ARGUMENT

Section 42.07(a)(1) of the Texas Penal Code is not unconstitutionally vague or overbroad. When the statutory terms are considered in light of the *scienter* requirement, persons of ordinary intelligence are given fair notice of the conduct which is forbidden. The State has a valid interest in proscribing obscene, threatening, and harassing telephone calls, and no First Amendment rights are implicated thereby. Even if engaging in such vexatious conduct may be said to constitute protected expression, the right to do so must yield to the privacy rights of the recipients of intentionally annoying communications.

ARGUMENT

SECTION 42.07(a)(1) OF THE TEXAS PENAL CODE IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBOARD.

A. Section 42.07(a)(1) gives persons of ordinary intelligence fair notice of the conduct which it forbids.

A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, *United States v. Harriss*, 397 U.S. 612, 617 (1954), or if it encourages arbitrary arrests and convictions. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). The constitutional prohibition against vagueness does not, however, invalidate every statute which a reviewing court believes could have been drafted with greater precision. *Rose v. Locke*, 423 U.S. 48, 49 (1975). "Condemned to the use of words, we can never expect mathematical precision from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). *See Rose v. Locke*, 423 U.S. at 50; *Roth v. United States*, 354 U.S. 476, 491-92 (1957). Whether the language conveys sufficiently definite warning must be determined by measuring it against "common understanding and practices," *Jordan v. De George*, 341 U.S. 223, 231 (1954), and the question whether a state statute is vague must be answered in light of prior state court constructions of the statute. *Wainwright v. Stone*, 414 U.S. 21, 22 (1973).

Appellant's claims of vagueness relate to the statute's use of the words "coarse," "offensive," "annoy," and "alarm." The Texas Court of Criminal Appeals has held, in a decision which this Court declined to review, that the words "annoy" and "alarm" are not unconstitutionally vague. *Collection Consultants, Inc. v. State*, 556 S.W.2d 787 (Tex.Crim.App. 1977), *appeal dismissed*,

436 U.S. 901, *rehearing denied*, 438 U.S. 908 (1978). In *Kramer v. State*, 605 S.W.2d 861 (Tex.Crim.App. 1979), the Court of Criminal Appeals addressed the identical contention made by Petitioner in the instant cause. The court held that the words "annoy" and "alarm" are not impermissibly vague, citing *Collections Consultants, Inc.*,[1] and also held that the words "coarse" and "offensive" pass constitutional muster, reasoning as follows:

> Appellant argues that if we allow the statute to stand then any recipient of a message may decide what that recipient thinks is "coarse and offensive", and that the person of ordinary intelligence is therefore without a guide to the conduct forbidden by Section 42.07. But the gravamen of the violation of Section 42.07(a) as charged in the information is the intent to annoy and alarm by means of a "coarse and offensive" message. . . . There is no room in the statute for a vindictive or overly sensitive recipient to create an offense by his own belief in the coarseness of offensiveness of a message.

605 S.W.2d at 866. Similarly, this Court, in rejecting a vagueness attack on an anti-noise ordinance, found relevant the *scienter* requirement contained therein. *Grayned v. City of Rockford*, 408 U.S. at 113-14. In *Karp v. Collins*, 310 F.Supp. 627 (D.N.J. 1970), *vacated on other grounds sub nom. Kugler v. Karp*, 401 U.S. 930, *on remand*, 333 F.Supp. 15 (1971), a New Jersey statute which proscribed the use of "loud and offensive" language in public (N.J. Stat.Ann. 2A: 170-29) was upheld from constitutional attack because the word "offensive" was construed to require an intentional disturbance of others. And in *People v. Smith*, 392 N.Y.S.2d

---

[1]Petitioner's contention that the Court of Criminal Appeals misconstrued its prior decisions in so holding does not present a question worthy of this Court's consideration.

968 (N.Y.S.Ct.), *cert. denied*, 434 U.S. 920 (1977), a New York statute which prohibited communicating by telephone "with intent to harass, annoy, threaten or alarm another person" and "in a manner likely to cause annoyance or alarm" (N.Y. Cons. Laws, Book 39 §240:30) was declared constitutional.

Unlike the ordinances held invalid in *Cox v. Louisiana*, 379 U.S. 536 (1965) and *Coates v. Cincinnati*, 402 U.S. 611 (1971), Section 42.07(a)(1) does not permit punishment merely for the expression of an unpopular view, nor does it contain a broad invitation to subjective enforcement. Absent an intent on the part of the caller to annoy or alarm the recipient, a "coarse and offensive" telephone call does not constitute an offense under the statute. When the statutory terms are "read in context and construed according to the rules of grammar usage," Tex. Rev. Civ. Stat. Ann. art. 5429b-2 §2.01; Tex. Penal Code Ann. §1.05(b), they do not fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden thereby.[2]

B. *Section 47.02(a)(1) is applicable only to vexatious conduct which is violative of the privacy rights of others, and the statute does not infringe upon any constitutionally protected expression.*

Petitioner concedes, as he must, that the State has a legitimate interest in prohibiting obscene, threatening, and harassing telephone calls, none of which is generally thought of as protected by the First Amendment. Even when the right to communicate is involved, it must be

---

[2] "There are areas of human conduct where, by the natue of the problems presented, legislatures simply cannot establish standards with great precision." *Smith v. Gougen*, 415 U.S. 566, 581 (1974).

balanced with "the right of every person 'to be let alone,'" *Rowan v. United States Post Office Department*, 397 U.S. 728, 736 (1970); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978), and the private property rights of others. *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). *See also, Cohen v. California*, 403 U.S. 15, 21-22 (1971).

> Nothing in the Constitution compels us to listen to or view any unwanted communication whatever its merit. . . . The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

Rowan v. United States Post Office Department, 397 U.S. at 737.

> The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "plac[ing] telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from "us[ing] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act Amendments, 91 Stat. 877, 15 U.S.C. §1692d (1976 ed., Supp. II).

F.C.C. v. Pacifica Foundation, 438 U.S. at 749 n.27.

It is precisely the kind of privacy rights involved in *Rowan* and *Pacifica Foundation* that Section 42.07(a)(1)

was designed to protect. Correctly recognizing that language which is not obscene may be unduly offensive to the listener, *see Kramer v. State*, 605 S.W.2d at 866, the legislature also chose to proscribe "coarse and offensive" communication which is intentionally annoying or alarming. The statute is by its terms inapplicable to public utterances and therefore may not be said to exert a "chilling effect" on constitutionally protected expression. Petitioner's reliance on *Walker v. Dillard*, 523 F.2d 3 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975) and *Radford v. Webb*, 446 F.Supp. 608 (W.D.N.C. 1978), *aff'd*, 596 F.2d 1205 (4th Cir. 1979) is misplaced. The overly broad statutes which were struck down in those decisions were not limited to deliberate intrusions upon the privacy of others.

CONCLUSION

For the above reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

Charles A. Palmer

CHARLES A. PALMER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent